National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: July 30, 1997

TO: James S. Scott, Regional Director, Region 32

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Stella Cheese, Case 32-CA-16062

133-8900, 512-5030-8000

This case was submitted for advice as to whether the employer's outside counsel violated Section 8(a)(1) when deposing non-party employees in preparation for federal civil litigation by failing to give the deponents Johnnie's Poultry[(1)] assurances, asking irrelevant questions about union activities and subpoenaing a deponent's Board affidavit.

FACTS

Stella Cheese (the Employer) discharged employees Wes Martin and Don Navarette following an organizing campaign. Martin and Navarette filed Board charges and complaint issued and is pending. The Employer also discharged supervisor Arthur Tellechea during this period. The Region dismissed a charge concerning Tellechea's discharge on the merits. Tellechea subsequently filed suit in California state court alleging, *inter alia*, that the Employer terminated him based on his union activities in violation of the public policy set forth in California Labor Code Section 923. The Employer removed the case to the United States District Court for the Eastern District of California based on diversity of citizenship.

Attorney S. Brett Sutton represents the Employer in both the Board proceedings and the lawsuit. In connection with Tellechea's civil action, Employer's counsel subpoenaed and deposed non-parties Martin and Navarette. At their depositions, Martin and Navarette were not represented by counsel. Employer's counsel gave no Johnnie's Poultry assurances but conducted extensive questioning about the union activities of the deponents and other current and former employees. Additionally, counsel subpoenaed Navarette's Board affidavit.

ACTION

We conclude that the Region should dismiss the charge in its entirety, absent withdrawal.

A. Failure to give Johnnie's Poultry assurances

Under Johnnie's Poultry, supra, an employer who is preparing its defense to pending unfair labor practice proceedings may inquire into the Section 7 activities of employees if the employer gives certain assurances to the questioned employees. However, in Maritz Communications Co., 274 NLRB 200 (1985), the Board set forth an exception to the necessity for giving those assurances. In Maritz, the terminated employee filed both an unfair labor practice charge and a civil lawsuit in federal court alleging a violation of the Michigan age discrimination statute. During depositions for the civil lawsuit, the employer asked the charging party about his Board charge and also about his relationship with the union. The Board in Maritz found no violation even though the employer gave no Johnnie's Poultry assurances. The Board noted "[b]ecause [*the charging party*] filed the lawsuit in which he was deposed, he must or should have been aware that the defendant could examine him concerning any matter relevant to the preparation of a defense to the civil suit."[(2)]

In U.S. Gypsum Co., Case 2-CA-24363, Advice Memorandum dated January 28, 1991, we applied the Maritz exception where the deponents were *not parties* to the civil lawsuit. In U.S. Gypsum Co., plaintiff employer filed in a New York Supreme Court a civil suit against one of its own supervisors and also against the union. The suit alleged, inter alia, that the supervisor's

organizing activities breached his duty of loyalty. The employer subpoenaed and deposed three non-party former employees to help prepare its civil case. During the depositions employer's counsel, without providing Johnnie's Poultry assurances, asked the witnesses about their contacts with the union, union meetings attended, promises tendered by the union, their roles and the roles of other individuals in the organizing campaign, and employee names and addresses. We held that the questioning did not violate Section 8(a)(1) for three reasons. First, the questions were arguably relevant to the issues presented in the lawsuit. Second, the New York Civil Practice Law and Rules (CPLR) adequately protected the subpoenaed employee witnesses since they could file a motion to deny or limit the deposition or have the court supervise all or part of the deposition. Third, if we had issued complaint in U.S. Gypsum Co., we would in effect have been asking the Board to engraft the Johnnie's Poultry safeguards into the New York CPLR.

The same three considerations and the same conclusion are warranted here. We specifically note first that under Federal Rule of Civil Procedure 26(b)(1), the courts have broadly construed the right to inquire into matters relevant to the subject matter of the pending action "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. ...[D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues." Maritz, 274 NLRB at 201, quoting Oppenheimer Fund v. Sanders, 437 U.S. 340, 351 (1977). In the present case, as set forth in the Scheduling Conference Order issued by U.S. District Judge Oliver W. Wanger on March 19, 1997, contested factual issues include "[w]hether Plaintiff was terminated because of his pro-union views" and "[w]hether Stella Cheese identified and decided to terminate pro-union employees." Thus, the questions Employer's counsel posed to the non-party deponents about their and other employees union activities were arguably relevant to the issues presented in the civil lawsuit.[(3)]

Second, the Federal Rules of Civil Procedure adequately protect subpoenaed non-party employee deponents. Federal Rule of Civil Procedure 26(c), entitled "[g]eneral [p]rovisions [g]overning [d]iscovery; [d]uty of [d]isclosure: [p]rotective [o]rders," provides in relevant part "[u]pon motion by a party or by the person from whom discovery is sought ... for good cause shown, the court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: ... (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters... ." Federal Rule of Civil Procedure 30(d) entitled "[d]epositions [u]pon [o]ral [e]xamination: [s]chedule and [d]uration; [m]otion to [t]erminate or [l]imit [e]xamination," provides in part

...A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3). ... (3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). ... Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order.

The Federal Rules of Civil Procedure provide a mechanism by which deponents, including non-party employee deponents, may seek and obtain judicial protection against improper questioning or tactics on the part of the deposer. Alternatively, the employee deponent may simply refuse to answer an alleged improper question, thereby forcing the employer, if it so chooses, to file a motion to compel disclosure under Federal Rule of Civil Procedure 37. Additionally, non-party deponents in other contexts do not receive affirmative notice of the protections available under the Federal Rules of Civil Procedure. Thus, there is no basis for requiring Johnnie's Poultry type assurances where employers depose non-party employee witnesses in preparation for federal civil litigation.

Third and last, if complaint issued in this case, we would in effect be asking the Board to engraft the Johnnie's Poultry safeguards into the Federal Rules of Civil Procedure for non-parties to the suit. Arguably, the Board has no such authority where the judicial system provides adequate safeguards for deposing non-party witnesses.[(4)] Thus, the Maritz exception applies in this case and we would not allege that Employer's counsel violated Section 8(a)(1) by failing to give the non-party employee deponents Johnnie's Poultry assurances.

B. Subpoenaing the Board affidavit

Requesting Board affidavits from employees involved in pending Board proceedings for use in those proceedings is often, but not always, a violation of the Act.[(5)] In determining whether a violation exists, the Board looks at the request in light of the totality of the circumstances, including whether the employee received Johnnie's Poultry assurances.[(6)]

This case raises a different question, whether Section 8(a)(1) was violated because, in preparation for federal civil litigation, Employer's counsel subpoenaed Navarette's Board affidavit pursuant to Federal Rule of Civil Procedure 45.[(7)] We conclude that it was not unlawful to seek the affidavit in these circumstances.

In Manville Forest Products Corp., Case 9-CA-26331, Advice Memorandum dated July 21, 1989, in preparation for a pending civil case, the employer subpoenaed three non-party employees who had given affidavits in connection with a concurrent union-filed Board case. The subpoenas required the employees to attend the deposition and bring copies of all affidavits they had given in connection with the matter involving employee Collins. Attached to the subpoenas was a letter from the employer's attorney, stating, "[t]he subpoena requires you to bring the documents listed on its attachment. If you do not presently have copies of the documents listed on the attachment, but can obtain them (for example from the NLRB or the OCRC), you must do so before the deposition." The employees appeared for the depositions and provided their Board affidavits over the objection of union counsel. We decided that the employer did not violate Section 8(a)(1) in serving subpoenas on the employees because under the Ohio Rules of Civil Procedure the employer had the right to subpoena all documents relevant to the civil litigation.

In reaching this conclusion, we relied on four key findings. First, the employees' affidavits were relevant to the employer's defense in the civil proceeding. Second, the Ohio Rules of Civil Procedure, which follow the Federal Rules of Civil Procedure, adequately protected the subpoenaed employee witnesses. Third, there was no contention that the request for the affidavits was retaliatory and baseless. Finally, although the Board can refuse under the Freedom of Information Act[(8)] to provide employee affidavits, a party to a civil suit can subpoena those affidavits from witnesses who have possession of those statements. Therefore, the Board arguably had no authority over the procedural matters related to the civil litigation.

A similar conclusion is warranted here. First, as noted above, under Federal Rule of Civil Procedure 26(b)(1), the courts have broadly construed the right to inquire into matters relevant to the subject matter of the pending action. Navarette's Board affidavit presumably relates to the circumstances surrounding his own discharge. In the civil case, contested factual issues include "[w]hether Plaintiff was terminated because of his pro-union views" and "[w]hether Stella Cheese identified and decided to terminate pro-union employees." Thus, the information contained in Navarette's Board affidavit was arguably relevant to the issues presented in the civil lawsuit, i.e., the Employer's treatment of employees it believed to be pro-union.

Second, the Federal Rules of Civil Procedure adequately protect subpoenaed employees asked to produce Board affidavits. Federal Rule of Civil Procedure 45(c), entitled "[p]rotection of [p]ersons [s]ubject to [s]ubpoenas," provides in relevant part (2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents ... Subject to paragraph (d)(2) of this rule[(9)] ... may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. ... (3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it ... (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies... .

Third, because we find that the affidavit, like the questions, was arguably relevant to the Employer's civil suit, it cannot be said that the request for the affidavits was retaliatory and baseless. Accordingly, under Supreme Court precedent, the Board cannot enjoin the subpoena as an unfair labor practice.[(10)]

For all these reasons, we do not find that Employer's counsel violated Section 8(a)(1) by subpoenaing Navarette's Board

affidavit pursuant to Federal Rule of Civil Procedure 45.

Accordingly, based on the above, we conclude that the Region should dismiss the charge in its entirety, absent withdrawal.

B.J.K.

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[1] **146 NLRB 770 (1964).**

[2] **Maritz Communications Co., 274 NLRB at 201-202.**

[3] **In Team Mechanical, Case 27-CA-14579, Advice Memorandum dated February 11, 1997, we found certain questions irrelevant, and therefore unlawful, only after the trial judge had narrowed the scope of discovery.**

[4] See Team Mechanical, supra (Utah Rules of Civil Procedure provide adequate protection to deponents); U.S. Gypsum Co., supra.

[5] **Dayton Typographical, 273 NLRB 1205, 1206 (1984), enf. denied in relevant part 778 F.2d 1188 (6th Cir. 1985); Magic Chef, Inc., 286 NLRB 380, 392 (1987). Cf. Romar Refuse Removal, 314 NLRB 658, 665 (1994); Astro Printing Services, 300 NLRB 1028, 1028-29, n.6 (1990).**

[6] **Dayton Typographical, 273 NLRB at 1206, 1214; Magic Chef, Inc., 286 NLRB at 392.**

[7] **At the deposition, Employer's counsel noticed that Navarette had brought a red folder with him. Counsel decided to subpoena the red folder, which contained the employee's Board affidavit.**

[8] **5 U.S.C. Section 552(b)(5).**

[9] **"(d) Duties in Responding to Subpoena. ... (2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim."**

[10] **We recognize that the court in Halloran v. Fisher Foods, 96 LRRM 3093, 3094 (N.D. Ohio 1977) suggested, in dicta, that an attempt to obtain Board affidavits from individual employees in preparation for civil litigation "may, itself, represent an unfair labor practice." However, this was before the Supreme Court held in Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), that the Board shall not condemn positions taken before a court as an unfair labor practice unless they are retaliatory and baseless. See Reeves Brothers, Inc., Case 11-CA-16491, Advice Memorandum dated July 24, 1995, at pp. 6-8; Manville Forest Products Corp., supra.**